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Supreme Court of the United States

October Term, 1957

No. 737

IRENE SHERMAN,

Petitioner,

against

SAM SHERMAN and SAMUEL W. SIEGEL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement and Background

The following recital and others to follow are given to show that the within application is like all of Petitioner's other attempts, without merit and its sole purpose, continued harassment.

Moe Sherman died September 19, 1949. Since then, the affairs of his estate have been constantly involved in a plethora of seemingly endless litigation, launched by Petitioner Irene Sherman, his widow, or resulting from her conduct.

She has successively been represented by six different attorneys (R. fols. 643, 747-8, 716; Pet. p. 14), with the attendant delays to enable the newcomers to familiarize themselves with what had transpired; and waste of funds so that the "Sherman Estate" may well be on its way to supplant "*Jarndyce v. Jarndyce*" in the affections of unreasonable and unreasoning litigants.

It is apparent that delay has been part of her strategy to wear everyone out and drive all to distraction.

Her primary motive has always been and still is to circumvent a contract between her husband and his brother, Sam Sherman, which provided the method, upon the death of either, for disposing of his share of the business (corporate in form), in which they were equally interested (R. Accountants' Exhibit 3, pp. 136-55).

While her desire, as residuary legatee, to get as much money as possible, and her failure to recognize that the lush years in the garment industry, immediately following the war, were over in the fall of 1949, are understandable, her methods are certainly not pardonable.

Besides studied delay, her efforts in this direction have been accompanied by the wildest, most irresponsible and totally unfounded charges of fraud, conspiracy and other wrongdoing (even criminality) against all and sundry, especially the executor and Sam Sherman, none of which charges she ever proved or even attempted to prove, in the long drawn out proceedings had. That she has not desisted from this approach, is evidenced from the innuendo in her brief herein that the executor is not to be trusted, and has been faithless to his trust, despite his complete exoneration of wrongdoing, by all courts, as will be shown.

In the recent accounting proceeding, with regard to the final determination of which, the writ is sought herein, she asserted claims that the estate was a co-owner of certain assets (R. fol. 111) of substantial value, but denied having in her possession a block of bonds belonging to the estate, which impelled the executor to start a Discovery Proceeding (R. fols. 237-8). What it accomplished was to have her concede she had the bonds, $11,200 of which she turned back to the executor, and $31,000 of which were then treated as an asset distributed to her, subject to her liability for contribution to administration expenses (R. fols. 243-6). As

to the other alleged co-owned assets above mentioned, she admitted on the record that she had no proof whatsoever and the claim as to any co-ownership by the estate was disallowed.

Although, in the Discovery Proceeding, a number of other items had been disposed of, she nevertheless proceeded with objections to the account as those very items, with the result that during the hearing before the Surrogate on the accounting, with time and effort wasted, her said objections, No. 3 to 8 (R. fols. 108-11) were withdrawn. (See R. pp. 79-85, 102-13, fol. 334.)

An example of her studied unreasonableness is evidenced by her attorney's claim that $147,000 of life insurance which had been paid directly to her by the respective companies, should not be included by the executor in the estate tax returns, to the truth of which the executor had to swear and the inclusion of which is required by law, State and Federal:

> "The Surrogate: You want to indicate that you will object to their including that in the estate tax proceedings, and, if they have, you will reserve your remedy, whatever it may be.
>
> Mr. Esquirol: That is my purpose. That was the only purpose of this objection" (objection, R. fol. 110; quotation fol. 251).

A similar objection was made, with a similar disposition, to the inclusion in the estate tax returns of U. S. Government bonds in the name of Moe Sherman or Mrs. Irene Sherman (R. fols. 252-3), also required by State and Federal law.

Another example of her tactics, was the inclusion, in her petition for construction, of a claim that her right of election under Section 18 New York Decedent Estate Law, had been violated (R. fols. 127-8), her subsequent withdrawal of that claim and her concession that an election had never been asserted (R. fols. 292-3).

POINT I

The petition should be denied as a very much belated, futile attempt to by-pass a final, judicial determination by the New York courts, made in 1952, from which no further appeal is legitimately available and in which proceedings no constitutional question was raised.

In 1952, the validity, legality and binding effect of the contract and the conduct and the status of the executor (except for fixing the amount to be computed within the terms of the agreement, left open for the accounting) had finally been determined, after a proceeding in the Surrogate's Court, followed by an action brought in the New York Supreme Court (in an attempt to by-pass the Surrogate's decision); and unanimous affirmance of both determinations in the Appellate Division of the Supreme Court and after said Court and the Court of Appeals had denied leave for further appeals.

In said 1952 determination, it was held:

1. That the agreement between deceased and his brother was not invalid as an ineffectual testamentary disposition; that the executor was not duty bound to attack its validity; that it constituted a binding and enforcible contract at deceased's death.

2. That there was no proof to sustain the charge that the executor's acts were fraudulent, dishonest, wasteful and in violation of his trust duties.

3. That the evidence did not sustain the charge of delay in the making of the report as to the valuation of the business; and, if there was delay, it did not prejudice the estate.

4. That the action of the executor, after his own appraisal had been made, in obtaining, at his own expense, an appraisal by a competent, disinterested firm of accountants, was voluntary and commendable; that although the latter valuation was in excess of that fixed by the executor, he did not act in bad faith.

5. That the designation by decedent of Samuel W. Siegel, not only as a fiduciary but as the person to compute the value of the corporate stock, is of significant importance, must be respected by the Court, and there is not such a conflict of interest as to justify removal of the executor.

6. That the situation in which the executor finds himself, as accountant for the corporation, is one of which the testator was not unaware, and it can be said that he contemplated and created it; that such position of the executor does not here create an objectionable condition.

7. That the amount that should be obtained by the executor, within the terms of the agreement, is to be determined in an accounting proceeding.

In *re Sherman's Estate* (Pet. p. 17), 104 N. Y. S. 2d 988 (April 18, 1951), aff'd 279 App. Div. 981 (April 1, 1952); leave to appeal denied 279 App. Div. 1065, 304 N. Y. 990 (October 9, 1952).

Sherman v. Siegel, New York Law Journal, July 19, 1951 (year erroneously printed as 1954, Pet. p. 24), aff'd 279 App. Div. 981 (April 1, 1952); leave to appeal denied, 279 App. Div. 1064, 304 N. Y. 990 (October 9, 1952).

Nowhere, in all said extensive litigation ending in 1952, it is respectfully submitted, was any constitutional question raised nor is the claim now made that it was raised.

The present attempt to raise it, as a result of the accounting proceeding which followed, will be discussed under another point.

POINT II

The petitioner has not been deprived of due process of law, in the final determination of valuation by the courts.

Her only deprivation is of the opportunity to continue to harass the executor and her brother-in-law, by outlandish and unfounded accusations.

What is this tremendous difference in valuation, for which, among other claims, she has kept this estate in a litigious uproar since 1949?

According to the Siegel evaluation made before he became executor, and not made as executor, as stated by Petitioner (his report was dated 10/18/49, R. p. 397; he became executor 11/14/49, R. p. 58) the estate was entitled to receive a net amount of $102,528.90 (R. fols. 70-1); also on a debt owing by the corporation to deceased, the sum of $51,875.53 (R. fols. 357, 80-1).

In the Leidesdorf evaluation, the debt was reduced to $33,468.42 but the valuation of deceased's interest in the business was increased by $39,052.38 (R. fol. 500). Such increase consisted in part of $12,956.59, the result of "palpable errors" made by Siegel in failing to evaluate certain minor items as was his custom of many years (R. fols. 369-71, 508-9, 370, 371, 270, 355), which omissions Sam Sherman readily agreed to rectify, his attorney stating on the record:

> "So far as we are concerned, we are going to pay the $13,000, but without prejudice * * *" (R. pp. 95-6).

The balance of $26,095.79, resulted from a different theory utilized by Leidesdorf in evaluating inventory.

Siegel testified that he had been accountant for the brothers for about thirty years, during all of which time

he had supervised their books, records, statements, and so forth, and had participated in the taking and the valuation of inventory (R. fols. 336-7); that, after the death of Moe Sherman, he prepared a financial statement showing the net worth of the business and an inventory was taken and evaluated (R. fols. 337-8); that in arriving at the market value, he really went under the theory of replacement; that if the replacement cost or value was less than the actual cost he took the lesser amount and vice versa (R. fols. 339-40); that he had never evaluated inventory in such a business differently (R. fol. 341), and always followed the same procedure (R. fol. 378).

The Leidesdorf report states that its balance sheet was prepared on the basis of generally accepted accounting principles (R. fol. 492).

However (and this is the crux of the principal difference), with regard to certain merchandise,

> "where the evidence indicates that cost will be recovered with an approximately normal profit upon sale in the ordinary course of business, no loss should be recognized even though replacement or reproduction costs are lower" (R. fol. 505).

The Petitioner who, in her objections to the account (R. fol. 105) had implied the true valuation to be in excess of $400,000, nevertheless not only failed to support the executor's attempt to sustain the Leidesdorf valuation, which was higher than his own, but did not even attempt to give any evidence as to any other valuation.

As the hearing was about to close, after efforts by the executor to get the larger amount (which would benefit her as residuary legatee) and efforts by Sam Sherman to pay the smaller amount, all her attorney, who had participated in the hearing and argument, had to offer by way of proof of valuation or otherwise, was:

> "Mr. Esquirol: That is all" (R. fol. 388).

Let us see what was the difference to the estate, between the Siegel report and the Leidesdorf report (giving effect to the concessions by Sam Sherman and exclusive of interest):

Leidesdorf increase in valuation of net worth		$39,052.38
Debt to deceased as per Siegel report	$51,875.53	
Debt to deceased as per Leidesdorf report	33,468.42	
Debt decrease		18,407.11
		$20,645.27
Less additional amount Sam Sherman has agreed to pay		12,956.59
Actual amount that was in dispute before the Surrogate (exclusive of interest)		$ 7,688.68

The Surrogate sustained the Leidesdorf report, as urged on behalf of the executor who took the same position in the Appellate Division.

However, shortly after the Surrogate had rendered his decision, the Appellate Division, First Department, rendered a decision in *Soechtig* v. *Amick*, 285 App. Div. 701, which indicated that long established and utilized accounting practices of a firm should not be disregarded. This decision was affirmed in the Court of Appeals, 309 N. Y. 988.

Accordingly, while we tried to differentiate our case in the Appellate Division, we were not very hopeful of sustaining the Surrogate's finding in favor of the Leidesdorf evaluation of inventory. However, Sam Sherman stuck to his agreement to pay approximately $13,000 which he conceded to be "honest mistakes" (R. fol. 286). It is apparent that because of such voluntary concession by him, the

Appellate Division directed that he pay same without interest.

The Court of Appeals sustained the Appellate Division (Pet. p. 31).

POINT III

The construction proceeding in the Surrogate's Court, the basis of the application for the writ herein, was not brought in good faith, is entirely of an academic nature and may not be utilized to revive an expired right to appeal, if it ever existed.

In 1952, it had been finally determined that the contract between the brothers was not of a testamentary nature and was binding upon the estate.

It had not been attacked as an alleged collusive or illusory instrument and it had also been shown that the brothers had executed similar contracts in prior years, as the form of their business (partnership, corporation, etc.) had varied (R. fols. 376-8).

Such contracts, for performance after death, have long been recognized as valid and enforcible against an estate.

Gilman v. *McArdle*, 99 N. Y. 451, 461 (1885). See 1 ALR 2d 1178-1276;

Sands v. *Miner*, 16 App. Div. 347, aff'd 160 N. Y. 693;

Smith v. *Furst*, 186 App. Div. 452, rehearing denied, 188 App. Div. 892;

Chase National Bank v. *Manufacturers Trust Company*, 265 App. Div. 406;

In re Ruszkiewicz' Estate, 41 N. Y. S. 2nd 437, aff'd 266 App. Div. 709;

In re Bednowitz' Estate, 152 Misc. 765;

McKinnon v. *McKinnon*, 56 Fed. 409;
Murphy v. *Murphy*, 217 Mass. 233;
Coe v. *Winchester*, 43 Arizona 500.

Accordingly, the injection via a construction proceeding, of an argument based on Section 125 of the New York Decedent Estate Law, was merely an attempt to revive that which had long before been laid to rest.

The said section, in plain language, indicates that it refers only to wills. The courts have held that it has no application to inter-vivos agreements.

Matter of Central Hanover Bank & Trust Co. (Momand), 176 Misc. 183, aff'd 263 App. Div. 801, aff'd 288 N. Y. 608.

Hence, any construction of the will based on said section 125, or otherwise, would be academic and futile. Even if the provisions of the will referring to a contract between the parties were excised or if there were no will at all, the contract would still be binding.

To rule that a valid and binding contract entered into by a testator in his lifetime, may be destroyed by an invalid provision in his will, would lead to a remarkable state of affairs, opening the door to anyone who wanted to relieve his estate from his obligations.

It therefore is inescapable that the construction proceeding, though it had to be disposed of, was a purely academic proceeding and could not, in any manner, affect the determination of 1952 with regard to the validity of the contract. Hence no further appeal will now lie.

POINT IV

Petitioner has failed to show that any constitutional question was ever raised in the state courts.

The only references to such a question were made in a motion for reargument in the Court of Appeals.

The notice of motion reads in part as follows:

> "* * * to reargue the appeal herein, or, in the alternative, for an order amending the remittitur in the above entitled proceeding to state the grounds of the decision of this Court in order to make it appear to the Supreme Court of the United States upon application for a writ of certiorari whether or not Objector-Appellant, Irene Sherman, has been afforded due process of law and whether or not she has been denied equal protection of the law as guaranteed by the Constitution of the United States of America. * * *"

It is respectfully submitted this does not raise any constitutional question.

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

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